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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL.,
Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANTS

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APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANTS

OPINION BELOW

The District Court issued its opinion on May 17, 1976. The opinion has not yet been reported but is reprinted at pages 1a to 13a of the Appendix to the Appellants' Jurisdictional Statement (AJS. 1a).[1]

[1] References to the Appendix to the Jurisdictional Statement will be cited as "AJS.," and references to the Appendix to this Brief for Appellants as "A." The pagination in the Appendix to the Jurisdictional Statement is in the form "1a, 2a, 3a, . . ." while that of the Single Joint Appendix is "1A, 2A, 3A, ..."

JURISDICTION

The jurisdiction to entertain this appeal from a decision of a United States District Court sitting as a court of three judges, is premised upon 28 U.S.C. §1253. The judgment of the District Court was entered on June 2, 1976. Appellants noted an appeal two days thereafter and probable jurisdiction was noted by this Court on October 4, 1975.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Maryland Code (1976 Repl. Vol.) Article 33, §7-1(e), the statute which the District Court determined was unconstitutional, reads as follows:

> ". . . Any paper which is to form a part of a certificate of candidacy shall be submitted to the board for the county or the City of Baltimore in

> which the signers on the paper are alleged to reside. The board shall give to anyone submitting any such paper or papers a signed receipt stating that the paper or papers are on file with the board. It shall be the duty of the several boards in the jurisdiction in which the signers are alleged to be registered voters to verify the number of legitimate signatures of persons who are registered voters. On any petition, including an associated or included set of petitions, submitted to the board, any question concerning the invalidity of the signature of any person on the petition affects that signature only and does not affect or impair any other portion of the petition or petitions. Following the verification, a duly authorized employee of the board shall endorse on each paper the number of signatures verified by the employee and shall endorse and sign the paper. For the purpose of the endorsement, each paper shall contain a blank space for the endorsement. *The papers shall be delivered to the boards not later than 9:00 p.m. on the Monday which is ten weeks or seventy days before the day on which the primary election should be held under the primary election law,* or in the case of candidates for an office to be filled pursuant to §22-1(b) of this article, the papers shall be delivered to the boards not later than 9:00 p.m. on the Monday which is three weeks or twenty-one days before the day on which the special primary election is to be held under the Governor's proclamation setting the date for the special primary election. All papers delivered to a board pursuant to this subsection and required to be filed with the State Administrative Board of Election Laws pursuant to §4A-2 shall, after verification and endorsement as herein required, be mailed or delivered by the board to the State Administrative Board of Election Laws, on the Monday which is five weeks or thirty-five days before the day on which the primary election should be held under the primary election law or, in the case of candidates for an office to be filled pursuant to §22-

> 1(b) of this article, on or before the Monday which is two weeks or fourteen days before the day on which the special primary election is to be held under the Governor's proclamation. The State Administrative Board of Election Laws shall determine the sufficiency of the percentage of registered voters signing petitions in those cases in which candidates file certificates of nomination or of candidacy in its office. In all other instances, such determination shall be made by the local boards." (Emphasis added).

This statute, which was reenacted with minor revisions by the Maryland General Assembly, effective July 1, 1976, now appears as Maryland Code (1976 Repl. Vol., 1976 Cum. Supp.) Article 33, §7-1(e) through (m). Also relevant to this case are the remaining provisions of §7-1 and certain portions of Article 33, §§4A-1, 4A-3 and 5-2. These statutory provisions are reprinted at pp. 19a-23a of the Appendix to Appellants' Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether decisions of this Court require that the constitutionality of the uniform deadline under Maryland law for filing nominating petitions in a Presidential election year (seventy days before the primary election) be gauged in conjunction with other elements of Maryland's system of gaining a place on the general election ballot rather than in isolation?

2. Whether that statutory deadline, viewed in isolation or in the context of the overall regulatory scheme for State ballot access, constitutes an unconstitutional denial of Appellee Bradley's right to obtain a place on the general election ballot and of the other Appellees' asserted right to have the candidate's name appear on that ballot?

3. Whether the summary disposition principles articulated in *Hicks v. Miranda*, 422 U.S. 332 (1975) required the District Court in this case to adopt the precise reasoning of the lower court's opinion in *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975) aff'd summarily sub nom, *Tucker v. Salera*, U.S. , 96 S. Ct. 1451 (1976) and relieved it of its duty to distinguish and harmonize prior summary affirmances and written decisions of this Court upholding the constitutionality of similar uniform filing deadlines?

STATEMENT OF THE CASE

With full knowledge of the strong field of party candidates from which his likely general election opponents were to come, Appellee Bruce Bradley, in the spring of 1975, decided to run as an independent candidate in Maryland for the United States Senate in 1976 (A. 50A-51A). In the fall of 1975 Bradley and his supporters began circulating petitions to obtain the necessary signatures for him to appear on the 1976 general election ballot in Maryland (A. 20A). Needing 51,155 signatures to qualify (3 percent of the State's registered voters determined as of four months before the primary), Bradley submitted 53,239 signatures to the local election boards for validation on March 8, 1976 (A. 39A). On the same date — the filing deadline for all State candidates including those campaigning in the party primaries — he filed a certificate of candidacy for the Senate seat. This filing deadline is fixed by law at 70 days before the primary election and occurs in early July (approximately 120 days before the general election) in non-Presidential election years and in early March (approximately 230 to 240 days before the general election) in years when voters make their nomination selections in a May Presidential Preference Primary.

Following the normal signature verification process, the State Administrative Board of Election Laws notified Bradley on April 15, 1976 that his petition papers contained only 42,049 valid signatures and were thus insufficient to gain him a place on the general election ballot (A. 23A). Signatures had been invalidated for various reasons, many having been offered by persons not registered to vote, or by persons who did not reside in the county indicated on the petition sheet, or by persons who had previously signed the petition (R. 49).

Two weeks later Bradley and various supporters who alleged only their status as petition signators or persons desirous of having the candidate's name on the general election ballot filed suit in the United States District Court for the District of Maryland. They contended in their complaint that their constitutional rights had been violated in that the remoteness of the early March candidate filing date from the date of the general election, standing by itself, placed an "unconstitutionally heavy burden" on Bradley's ability to be nominated by petition in a Presidential election year and thus restricted his First Amendment right of political association, "unconstitutionally impacted the Plaintiffs' right to vote" by unduly limiting the number of potential candidates for elective office and violated the Equal Protection Clause of the Fourteenth Amendment in that party primary candidates need not comply with the petition requirement while "independent candidates must comply with the unnecessarily burdensome requirement of filing nominating petitions at a date far removed from the date of the general election".

Appellees also challenged certain aspects of the signature validation procedures and other practices of the local election boards as "exacerbating the remote-

ness of the filing deadline". However, this issue was neither pressed by Appellees nor decided by the lower court.

At the hearing before the three-judge panel, Appellees introduced affidavit testimony designed to show that Bradley had encountered difficulties in his efforts to obtain media coverage (A. 18A) and to appear before various organizations prior to the filing deadline, with several of the latter indicating that he might appear later with other candidates running in the primary election (A. 27A-30A). Some testimony was offered as to the alleged difficulties inherent in circulating petitions in winter weather and during the Thanksgiving and Christmas holiday seasons (A. 22A). Finally, Appellee Bradley's affidavit indicated difficulty in approaching potential petition signers far in advance of the general election when the issues which were then current might not be the most important issues in November (A. 17A). While Appellees premised their constitutional attack on the 70 day pre-primary deadline solely on its remoteness from the *general election*, virtually all of their evidence and argument advanced before the District Court focused on the difficulties of gathering petition signatures more than 70 days before the *primary election*.

The State introduced evidence demonstrating that while independent candidates must file their petitions by the same early date on which all candidacies must be perfected, they are favorably treated under various other provisions of State law generally beneficial to independent candidacies and enjoy certain inherent practical advantages over party primary candidates. This evidence established that:

1. Maryland law places no limit whatsoever on the period during which signatures can be gathered prior to

the filing deadline, and an independent candidate may gather petition signatures months and even years before the deadline.

2. Persons signing nominating petitions for independents may be affiliated with the major parties and are not disqualified from voting in the primary elections.

3. Signatures are required of only 3 percent of the registered voters eligible to vote for that office — a figure substantially less than the maximum heretofore sustained by this Court.

4. Signers do not have to state their intention to vote for the candidate.

5. Petitions may be circulated by non-residents and persons not registered to vote in Maryland.

6. Because of Maryland's liberal registration by mail statute (Art. 33, §3-1), independents may simultaneously approach signators and furnish them with a registration by mail form which need only be completed and mailed to complete registration (A. 32A-36A).

In addition, Professor Richard Smolka of American University, a qualified expert on the law and conduct of elections, testified that an independent candidate seeking signatures would have an easier time gathering signatures before the heat of the primary election campaign, by which time many voters have crystalized their views as to the candidates (A. 33A). He further testified that unlike a primary candidate, an independent does not have to defeat an opponent to get on the general election ballot, usually spends less money, must gather fewer signatures than a primary candidate needs votes, and does not have to urge frequently reluctant voters to the polls but can obtain their "vote" for nomination on the spot. He also noted that the

petition signer is asked to take the relatively easy step of supporting a candidate without prejudice to his ability to vote to nominate another, whereas the primary candidate must convince his electorate to support him to the exclusion of his opponents. Finally, Professor Smolka noted that because of the large financial investment usually required of primary candidates and the State and federal regulation of campaign spending and contributions, primary candidates have a greater need than independents to know the field of candidates at an early date "in order to make intelligent decisions relative to the solicitation of contributions and the expenditure of monies during the primary election campaign" (A. 33A-35A). Professor Smolka's testimony was supported by Willard A. Morris, the State Administrator of Election Laws (A. 41A).

The State also established that during the last gubernatorial election in Maryland (1974) five persons qualified as independent candidates for the Maryland House of Delegates and three for the State Senate via the nomination by petition route (A. 43A-44A), and that in 1976 two persons gathered sufficient signatures by March 8 to qualify for the general election ballot as candidates for the United States House of Representatives (A. 60A-61A). As already noted, Mr. Bradley himself would have qualified had a higher percentage of his submitted signatures been valid.

The State of Maryland asserted as substantial or sufficient numerous State interests served by the simultaneous filing deadline for primary candidates and independents. These included:

1. The prevention of frivolous and fraudulent independent candidacies maturing only after the conclusion of the primary elections.

2. The elimination of voter confusion caused by late blooming candidacies, a consideration especially important in a Presidential year when political activity is both more intense and more long lasting.

3. The need to insure that both party primary candidates and independent candidates, including those who obtain general election ballot access, are afforded relatively comparable treatment and that neither are given an unfair advantage.

4. The fostering of public discussion of campaign issues among *all* candidates when voter interest is at its zenith, rather than allowing independent candidacies to remain embryonic or dormant until the primaries have ended.

5. The prevention or alleviation of the administrative problems that might surface if the petition verification process and likely challenges (such as this one) were telescoped into a shorter and later period of time.

6. The promotion of these interests while still preserving the right of Maryland voters to express themselves early in a Presidential election year as to their choice for Presidential nominees.

On May 17, 1976, the court issued its opinion, holding that the filing deadline of Section 7-1(e) standing by itself constitutes "an unconstitutional burden on Bradley's right to become an independent candidate and on the rights of the other plaintiffs to exercise their right to vote" (AJS. 12a) and that Bradley had a constitutional right to collect the requisite number of valid signatures until the date of the primary election. The court made no attempt to analyze the evidence presented on the relative burdens of independents and primary candidates, to weigh all of the State interests advanced or to focus on the filing deadline in light of other provisions of State law, but concluded that its decision was controlled legally and factually by the

opinion of the three-judge district court in *Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd sub nom. Tucker v. Salera*, 96 S. Ct. 1451 (1976). (AJS. 6a).

Even though the statute at issue in *Salera*, unlike the open-ended Maryland law, allowed a scant three week period for the gathering of signatures, even though much of the language in the *Salera* opinion seemed to indicate that the three-judge court there struck down the Pennsylvania filing deadline by viewing it in conjunction with the brief signature gathering period, and even though the practical effect of the *Salera* decision was to eliminate the three week limitation for the plaintiffs in that case, the *Bradley* court was convinced that both the Pennsylvania panel and this Court, without giving any weight to Pennsylvania's questionably short signature gathering period, had struck down in isolation the filing deadline for independents of 218 days before the general election (AJS. 9a). The lower court here rejected the proffered compelling interests asserted by Pennsylvania in *Salera* (administrative convenience, misuse of the nomination by petition procedure by defeated primary candidates and the promotion of intelligent voting through voter knowledge of candidates) as if they were simply being reasserted by Maryland (AJS. 6a-8a). In addition, the court held that Maryland's simultaneous filing deadline for independents and primary candidates could not be justified on a comparable or equal treatment theory.

In response to the State's argument that the constitutionality of Section 7-1(e) had been sustained by recent prior decisions of three-judge panels in Maryland, which had been summarily affirmed by this Court (*Auerbach v. Mandel*, Civil No. 71-141-N (D. Md. March 3, 1972), *aff'd* 409 U.S. 808 (1972) and *Maryland*

People's Party v. Mandel, Civil No. 72-865-K (D. Md. September 5, 1972), *aff'd* 410 U.S. 907 (1973)) and was fully supported by summary affirmances of decisions from other jurisdictions (*Socialist Labor Party v. Rhodes,* 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham v. Gilligan,* 409 U.S. 942 (1972); *Pratt v. Begley,* 352 F. Supp. 328 (D. Ky. 1970), *aff'd* 409 U.S. 943 (1972); *Jackson v. Ogilvie,* 325 F. Supp. 864 (N.D. Ill.), *aff'd* 403 U.S. 925 (1971)), the District Court said that language in its earlier opinions regarding the Section 7-1(e) filing deadline, while "it seemed to reflect the law at the time it was uttered", was "pure dictum". (AJS. 11a.) The lower court went on to express its belief that while the question had been presented in the *Auerbach* and *Maryland People's Party* Jurisdictional Statements and Motions to Affirm, the Supreme Court had not yet decided the question of the constitutionality of the Maryland filing deadline in summarily affirming those decisions (AJS. 11a).

Finally, the District Court felt that under *Hicks v. Miranda,* 422 U.S. 332 (1975) it was bound to follow its own perception of the last summary affirmance of this Court, despite less recent summary affirmances and written opinions of this Court to the contrary.[2]

SUMMARY OF ARGUMENT

The District Court erroneously concluded that Maryland's statutory deadline for filing nominating petitions (Maryland Code, Article 33, Section 7-1(e)) excessively burdened Appellee Bradley's First Amendment right to associate for political purposes and the other Appellees'

[2] In addition to the cases cited, *supra,* the *Bradley* court denigrated as "no longer the law" on the constitutional treatment of pre-primary deadlines the written opinions of this Court in *Jenness v. Fortson,* 403 U.S. 431 (1970) and *Williams v. Rhodes,* 393 U.S. 23 (1968). (AJS. 11a).

right to vote effectively so as to discriminate against independent candidates.

Applicable Principles

Decisions of this Court require lower courts to weigh the constitutionality of a filing deadline for independent candidates in conjunction with other elements of the State's system of general election ballot access and in the light of the actual experience of independent candidates in obtaining a place on the ballot. *Storer v. Brown,* 415 U.S. 724 (1974); *Jenness v. Fortson,* 403 U.S. 431 (1970); *Auerbach v. Mandel,* 409 U.S. 808 (1972). The District Court in this case ignored these principles by examining Maryland's filing deadline in isolation and by failing to note the significant number of independent candidates who qualified for access to the general election ballot in 1974 and 1976 or the fact that Appellee Bradley filed the requisite amount of signatures by the deadline at issue in this case.

"Burdens" Of Section 7-1(e) Deadline

Only excessively or severely burdensome ballot access requirements merit constitutional scrutiny. *Storer v. Brown, supra.* Maryland's uniform pre-primary filing deadline does not place an excessive burden on an independent's constitutional rights because signatures can be gathered months or years before the deadline and the State's nomination by petition process imposes no "suffocating restrictions" upon the free circulation of nominating petitions. Moreover, in many respects independent candidates in Maryland have an easier route to the general election ballot than primary candidates. And the evidence in this case demonstrates that Bradley's initial failure to obtain a place on the general election was due more to

the inefficiency of his petition circulation campaign than to the Section 7-1(e) filing deadline.

Discrimination Against Independents

Maryland's uniform pre-primary filing deadline does not discriminate against independent candidates. Decisions of this Court recognize that uniform filing deadlines promote equal treatment for all candidates. *Jenness v. Fortson, supra; Pratt v. Begley,* 409 U.S. 943 (1972); *Auerbach v. Mandel, supra.* Instead of Maryland's workable scheme for adjusting the relative burdens of obtaining general election ballot access, the District Court has created a system that unjustly discriminates against primary candidates and imposes greater hardships on all candidates.

Substantial State Interests Justify The Section 7-1(e) Deadline

Whatever burdens may be placed on independent candidates by Section 7-1(e) and whatever discrimination may be said to arise from Maryland's filing deadline are supported by numerous substantial interests, including the prevention of frivolous or fraudulent candidacies, the promotion of voter and candidate knowledge of all general election candidates at the same time, the fostering of an even-handed system of ballot access which prevents independents and primary candidates from obtaining an unfair advantage, the stimulation of public discussion among all candidates when voter interest is at its zenith and the preservation of the right of Maryland voters to be heard at an early point in a Presidential election year as to their choice for Presidential nominees.

Precedential Effect Of Salera v. Tucker

The lower court erred in concluding that the summary disposition principles articulated in *Hicks v. Miranda,*

422 U.S. 332 (1975) required it to adopt its perception of the precise reasoning of the lower court opinion in *Salera v. Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975) aff'd sub nom. *Tucker v. Salera,* 96 S. Ct. 1451 (1976) and to overrule five summary affirmances and two written Supreme Court decisions supporting the constitutionality of filing deadlines such as that set forth in Section 7-1(e). *Hicks* applies to summary dismissals, not summary affirmances; it involved a federal court's disregard of a prior summary dismissal of an appeal from a state court decision upholding the constitutionality of the same statute before the federal court. But even if *Hicks* is held to apply to summary affirmances, it does not relieve a lower court of its obligation to distinguish and harmonize prior summary affirmances and written decisions of this Court. Finally, the District Court here disregarded numerous opportunities to distinguish *Salera* and avoid a draconian reversal of a long line of cases which support the constitutionality of Maryland's uniform pre-primary filing deadline.

ARGUMENT

I.

DECISIONS OF THIS COURT REQUIRE THAT THE CONSTITUTIONALITY OF SUBJECTING INDEPENDENT CANDIDATES TO MARYLAND'S UNIFORM PRE-PRIMARY FILING DEADLINE BE GAUGED NOT IN ISOLATION BUT IN CONJUNCTION WITH OTHER ELEMENTS OF THE STATE'S SYSTEM REGULATING ACCESS TO THE GENERAL ELECTION BALLOT AND IN LIGHT OF THE ACTUAL EXPERIENCE OF INDEPENDENT CANDIDATE BALLOT ACCESS.

Out of respect for the diversity which is the hallmark of State election laws, this Court has always focused on the overall statutory scheme regulating ballot access and has eschewed any rule automatically invalidating isolated provisions of State law alleged to burden an

independent's rights. In *Storer v. Brown*, 415 U.S. 724, 730 (1974) this Court said:

> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree,' very much a matter of 'consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' What the result of this process will be in any specific case may be very difficult to predict with great assurance." (Citations omitted).

In *Storer*, the Court ordered a three-judge federal panel to weigh the constitutionality of California Election Code provisions requiring an independent candidate to file petitions signed by five percent of the entire vote in the preceding election and gathered over a particular twenty-four day period *in conjunction with* a statute which disqualified voters who voted in the primary from signing an independent's petition. At the same time, the Court indicated that the only exception to the rule requiring courts to assess the "totality" of election laws as they affect constitutional rights was when a single challenged statute "absolutely barred" a candidate from the ballot and the facial validity of the provision was questioned. 415 U.S. at 737.[3]

[3] This exception to the totality rule appeared almost as a rule of standing so as to prevent candidates validly barred by one election law provision from challenging others.

As a practical matter, candidate or nominating petition filing deadlines are not absolute bars to an independent candidacy, for, in the words of *Storer*, they do "change [their] character when combined with other provisions of the electoral code". *Id.* at 737.[4] In addition, this Court has always viewed such statutory provisions in conjunction with other features of state election laws in gauging their effect on a candidate's constitutional rights. For example, in *Jenness v. Fortson*, 403 U.S. 431 (1970), this Court upheld the constitutionality of a five percent signature gathering requirement as coupled with a 180-day signature circulation period ending sixty-nine days before the primary and five months before the general election and various other statutory provisions which fostered the "open quality" of the State electoral system. *Id.* at 439. And in *Williams v. Rhodes*, 393 U.S. 23 (1968), a candidate filing deadline was struck down but only in conjunction with restrictive provisions of Ohio law which made it virtually impossible for a nonparty candidate to obtain ballot access. Moreover, in the specific context of Maryland's nomination by petition law, this Court has apparently examined the filing deadline at issue in this case as it operates in tandem with other state election law provisions. In *Auerbach v. Mandel*, No. 72-141-N (D. Md. March 3, 1972), aff'd 409 U.S. 808 (1972), the only portion of Section 7-1(e) challenged was the filing deadline set therein. Jurisdictional Statement, at 12; *Auerbach v. Mandel, supra.* Yet this Court indicated in *Storer* that it had also approved the signature percentage requirement of Section 7-1(e) in affirming *Auerbach*, 415 U.S. at 739 N. 10.

[4] The District Court in *Bradley* made no explicit finding that Maryland's filing deadline was "facially invalid". It merely declared that "Plaintiffs are being deprived of their constitutional rights *by the operation of Section 7-1(e)*". (Emphasis added). (AJS 14a).

In mandating that the alleged burdens of a particular election law provision, such as a filing deadline, be gauged in tandem with other election code features, this Court has charged lower courts to inquire into the "nature, extent and likely impact" of the requirements, *Storer v. Brown, supra,* at 738, and to look to actual experience as an unerring guide of the extent of the burdens imposed by the statutory scheme. *Id.* at 742; *Jenness v. Fortsen, supra,* at 439. See also *Buckley v. Valeo,* U.S. , 46 L. Ed. 2d 659, 735 (1976).

Moreover, this Court has never indicated that all restrictions or burdens placed on the access of nonparty candidates to the ballot affect constitutional rights. Only "excessively" or "severely" burdensome requirements and "substantial" restrictions call constitutional examination into play. See *Storer v. Brown, supra,* 415 U.S. at 729, 738. And even "substantial" restrictions on the right to vote or to associate are not subject to automatic invalidation. It is only when the restrictions severely burden the right to associate for political purposes and the right to vote effectively that discrimination against independent candidates must be justified by the showing of compelling state interests. *Id.* at 729.

These pronouncements and the analytical methodology they require were totally ignored by the lower court in its rush to read *Salera* as signaling a fundamental change in this Court's attitude toward state laws governing minor party or independent candidacies. Under the lower court's inflexible invalidation of pre-primary deadlines, even a statutory scheme requiring that a mere 50 signatures be gathered to obtain general election ballot access would be determined to be excessively burdensome if the signatures must be filed by a specified date weeks or months before the state's primary elections.

The fundamental unsoundness of considering the statutory deadline in isolation rather than as a part of the overall scheme is further highlighted by the lower court's fashioning of a rule which ignores the actual experience of independent ballot access in Maryland. History has proven that non-major party candidates have fared well in Maryland (A. 41A-49A). For example, eight local candidates qualified as independents under Maryland's nomination by petition procedure in 1974 (which was the same as it is now), and two Congressional candidates filed the requisite number of valid signatures by the March 8 deadline in 1976. Even Appellee Bradley filed more than the required number of signatures by the deadline at issue in this case; his quest for a place on the ballot without the help of the courts was stymied because a number of those signatures were invalid. The evidence before the lower court indicated that his inability to qualify as a candidate was due at least as much to his failure to conduct a sufficiently vigorous and efficient petition campaign as it was to the March deadline.[5]

In short, this Court's requirement that actual experience be examined in determining the burden of a ballot access restriction was deliberately ignored by the lower court. See *Storer v. Brown, supra,* at 742; *Jenness v. Fortson, supra,* at 439.

II.

WHETHER VIEWED IN ISOLATION OR IN THE CONTEXT OF THE OVERALL REGULATORY SCHEME FOR STATE BALLOT ACCESS, MARYLAND'S UNIFORM PRE-PRIMARY FILING DEADLINE DOES NOT PLACE EXCESSIVE OR SUBSTANTIAL BURDENS ON THE RIGHTS OF INDEPENDENT CANDIDATES.

In 1969, in a substantial reform of the Maryland election laws, Maryland voters were given the right to

[5] See p. 27 *infra.*

vote for their preference for candidates for President and to elect delegates to the National Party Conventions held during the summer. Chapter 560 of the Laws of 1969. This reform replaced a convention system where the voters had no direct voice in selecting the party nominee for President. As a matter of course, the Presidential Preference Primary must take place a reasonable amount of time before the National Convention and thus the General Assembly selected the third Tuesday in May as the date for such primaries. Maryland Code, Article 33, Section 5-2(a). In non-Presidential election years, Maryland's primary elections are held on the second Tuesday after the first Monday in September. *Id.*

At the same time, substantial revisions were made to the provisions of Maryland law governing nomination by petition by Chapter 554 of the Laws of 1969. For the first time party primary candidates were placed on exact parity with independent candidates with respect to filing deadlines. For at least two decades party primary candidates have had to file their certificates of candidacy 10 weeks or 70 days before the primary. Prior to the 1969 change, the deadline for the filing of nominating petitions had been 30 days later than that for primary candidates — independents had to file only 40 days before the primary election. In 1969, the 10 week or 70 day provision was also made applicable to independent candidates seeking nomination by petition, who thereby were required to file by the same deadline their certificate of candidacy accompanied by the requisite number of signatures.

In addition, certain long-standing "burdens" placed on those circulating nominating petitions were eliminated by Chapter 554. Gone were the former requirements that signers state their intention to vote for the

person nominated (a feature still found in some state laws)[6] and specify the precinct or district where registered[7] and that the affiant certify that he knew the signers to be registered voters of the specific precinct as set forth in the petition. The requirement that independent candidates publish their petitions was also abandoned.[8] These reforms eased the burden of the nomination by petition process in Maryland which was already more liberal in many respects than under other state election laws. For example, persons signing petitions may be members of a party and their signing will not disqualify them from voting at a primary or general election in any way they wish; and the affiant gathering and submitting signatures does not have to be a registered voter or a state resident. Most importantly the time period for petition gathering in Maryland is open-ended. Independent candidates may gather signatures months, even years in advance of the filing deadline.[9]

[6] Although this declaration was regarded by Maryland courts as not legally binding on a voter, *Munsell v. Hanwegan*, 82 Md. 15 (1943), its psychological impact on a potential signer is incalculable.

[7] At one time under Maryland law signers had to specify their occupation and place of business on the petition. See Maryland Code (1951), Article 33, Section 44.

[8] In 1968 it cost third party candidate George Wallace $16,822 and independent senatorial candidate George P. Mahoney $10,160 to publish their petitions. If Appellee Bradley had been required to make such an expenditure, it would have cost him anywhere from one-third to one-half of his petition campaign budget of approximately $30,000. Transcript of Proceedings at p. 26.

[9] In 1969, the nomination by petition law was changed to require that the signatures of all nominating voters be submitted to the board with which they are registered. This change was prompted by the enormous difficulties which had been encountered in verifying major nominating petitions in 1968 (A. 42A) and was more than justified by the relaxation

The 1969 revisions of the Maryland nomination by petition law were soon challenged in court. In *Wood v. Putterman*, 316 F. Supp. 646 (D. Md. 1970), aff'd 400 U.S. 859 (1970), a third party which failed to generate a minimum required showing in a prior election unsuccessfully attacked the statutory requirement that it must obtain access to the general election ballot through the petition process. A key issue in the case was the alleged burden imposed by Section 7-1 of Article 33. Speaking for the majority of a three-judge panel, Circuit Judge Harrison Winter contrasted the Ohio statute struck down in *Williams v. Rhodes, supra*, with the Maryland nomination by petition law and noted that:

> "7-1 permits nomination by petition signed by only 3% of the total registered voters entitled to vote for the office for which the nomination is sought. *There are no other restrictions of any consequence*, except that no person may join in nominating more than one nominee for each office to be filled; nor may any person sign more than once for the same nominee for an office." (Emphasis added.) *Id.* at 649.

In 1972 a similar court challenge by a third party candidate squarely raised the constitutionality of the Section 7-1(e) filing deadline (which occurred two days earlier in 1972 than in 1976). In *Auerbach v. Mandel*, No. 72-141-N (D. Md. March 3, 1972), aff'd 409 U.S. 808 (1972), Judge Winter, speaking for a unanimous three-judge court, said that the March 6 filing deadline although a "heavy burden" was not "an unreasonable time". The court's order in that case expressly declared that the challenged provisions of the State election code including the candidate filing deadline "are not

of the requirements as to the information which must appear on the petitions and the need to allow the verification process to be completed in a prompt and efficient manner.

unreasonable or unconstitutionally burdensome and are not invalid."[10]

An analysis of the entire scheme for nomination by petition in Maryland demonstrates the correctness of these prior decisions. Unlike the statute at issue in *Salera v. Tucker, supra*, which gave a candidate and his supporters only 21 days to gather the requisite number of signatures, Maryland has an "open" signature gathering period. Until the deadline, candidates can spend months or years gathering signatures. Unlike the filing deadline in *Salera*, which was always fixed at approximately seven to eight months before the general election, Maryland's simultaneous filing deadline for independent and party candidates occurs approximately 120 days before the general election in non-Presidential election years[11] and 230 to 240 days before the general election in a Presidential election year only because in those years the *entire electoral process* is "stepped up" and given an early start to afford Maryland voters the opportunity to voice their preference in the Presidential primaries and thereby exert some influence at the summer conventions. In addition, Maryland's nomination by petition process imposes no "suffocating restrictions" upon the free circulation of

[10] The language of the district court's order in *Auerbach* belies the suggestion of the *Bradley* court that *Auerbach* did not decide the constitutionality of the Section 7-1(e) filing deadline. Moreover, an examination of the jurisdictional statements in the *Auerbach* case and in *Maryland People's Party v. Mandel*, Civil No. 72-865-K (D. Md. September 5, 1972), aff'd 410 U.S. 907 (1973), discloses that this issue was clearly presented to this Court.

[11] A deadline ending 150 days before the general election was sustained in *Jenness v. Fortson*, 403 U.S. 431 (1970); and quite conceivably the 120 day provision in non-Presidential election years can be justified on the basis of administrative convenience alone. *Cf. American Party of Texas v. White*, 415 U.S. 767, 787 n. 18 (1974).

nominating petitions and in this important respect strikingly resembles the Georgia statutory scheme scrutinized and upheld in *Jenness v. Fortson,* 403 U.S. 431, 439 (1970):

> ". . . a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand is a person who was not even registered at the time of the previous election."

In no way can it be said that Maryland's statutory scheme operates "to freeze the political status quo." *Id.* at 438.

Appellees' principal complaint below was not that the entire Maryland scheme for independent ballot access froze the political status quo, but that Maryland's filing deadline requires the independent candidate to make excessively early preparations for his candidacy; to, in effect, have finished his quest for a place on the ballot just as the primary candidates are beginning. This is sheer fiction. Few, if any, primary candidates who ex ect to win are just launching their campaigns on the filing deadline. In most cases a primary candidate has invested a substantial amount of time and labor prior to the filing date, and the evidence below establishes that this was the case with respect to the main contenders in the primary contests for the United States Senate seat sought by Bradley. Bradley was hardly alone among the various candidates when he sought out the voters in late 1975 and early 1976 (A. 51A).[12] (Transcript of

[12] In addition, in *Storer v. Brown, supra,* where this Court upheld a requirement that an independent candidate must not have been affiliated with a political party for a year before the primary, the Court rejected this very same type of burdensome "anticipation" argument:

"It is true that a California candidate who desires to run for office as an independent must anticipate his candidacy substantially in advance of his election campaign, but the required foresight is little more than the possible 11 months examined in *Rosario* [*v. Rockefeller,* 410 U.S. 752 (1973)] and its direct impact is on the candidate, and not voters." 415 U.S. at 734.

Proceedings at 51). In the same vein, Appellees contended that voters have no interest in a candidacy prior to the March 8th filing date. This is hardly tenable in a Presidential election year when political campaigns are on everyone's mind before the first snowfall in New Hampshire. As just noted, Bradley and his rivals were all approaching and appearing before the voters during this "remote" period, and Bradley did get more than 50,000 signatures on his petitions, and two Maryland independent candidates for the United States House of Representatives were able to generate enough voter interest in early 1976 to satisfy this same 3% requirement which Bradley fell short of. If an independent candidate is unable to generate sufficient interest in his campaign early in the year, he has himself to blame — not the system or the season.

A close examination of the burdens which Bradley alleges were imposed upon him as a result of the §7-1(e) filing deadline demonstrates the insubstantiality of his attack on the statute. Bradley stated that his independent candidacy was harmed because the issues debated during the petition gathering period might not be important in the 1976 general election (A. 17A). However, Bradley signature gatherers were instructed *not to discuss issues.* See Appendix C to Plaintiff's Memorandum in Support of Motion for Temporary Restraining Order (R.). Their pitch for signatures centered on giving voters a greater array of choices on

the ballot. *Id.* And the closest signature gatherers came to discussing "issues" was their characterization of Bradley to voters who inquired as a candidate who was "liberal on people issues and conservative on money issues". *Id.* Appellants submit that in the face of such a record it remains to be seen how Bradley was harmed by shifting campaign issues.

Secondly, Bradley's petition campaign was allegedly damaged by the lack of press coverage (A. 17A). It is claimed that the lack of press coverage was due to the remoteness in time from the primary and general election campaigns. However, what newspapers will or will not print about *any* candidate is a speculative matter. Independent candidates who qualify for the general election ballot and primary candidates who have no real contest will often find themselves ignored by the media. In addition, there is no guarantee that a nomination by petition campaign would obtain greater press coverage if the independent filing deadline were extended to the date of the primary election. If anything, newspaper coverage of a petition gathering effort during the primary campaign might be even harder to obtain because of the attention focused on the primary. Conversely, there is no reason why the petition drive of independent candidates should be legally entitled to any derivative benefits flowing from increased media interest in primary election campaigns.

Thirdly, Appellees contended that the March filing deadline hampered Bradley's ability to obtain invitations to speak before groups (A. 27A-30A). Yet as Bradley's instructions to signature gatherers indicate, his petition campaign was keyed primarily to obtaining signatures at supermarkets, shopping malls, sporting arenas, etc. rather than at meetings and conventions.

Appendix C to Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order (R. 54). In addition, if the lack of speaking invitations before the filing deadline is a burden, it is one shared by primary candidates.

Finally, despite the fact that in 1976 Maryland had one of the mildest winters in its history (A. 43A), Appellees allege that cold and inclement weather and school vacation schedules during the fall of 1975 and the winter of 1976 burdened the Bradley signature gathering effort (A. 22A). If such considerations are to be given any weight in the constitutional equation, the course of constitutional adjudication will become as unpredictable as the weather.

As the nature of Appellees' excuses for the initial failure of Bradley's nomination by petition campaign indicate, the §7-1(e) filing deadline is not the cause of the candidate's problems. Rather, the evidence demonstrates that the inefficiency of the signature gathering effort was the prime reason for its failure. For example, Bradley's campaign manager testified with respect to the turmoil in the campaign organization (A. 20). In addition, Bradley paid signature gatherers on a per signature basis rather than for each valid signature (Transcript of Proceedings at 19-20) and suffered from an invalidation rate of over 20% (A. 39A). He did not use the postcard-registration technique to sign up unregistered voters (Transcript of Proceedings at 37). He also did not begin gathering signatures as soon as he could have and raised and spent far less than the principal candidates in the Democratic Primary. Transcript of Proceedings at 26-27.

In short, it was not pre-primary filing deadline which would have kept Bradley off the general election ballot,

but his failure to conduct a sufficiently vigorous and efficient petition campaign.

Moreover, the evidence below establishes that the pre-primary filing deadline for independent candidates is found to offer the independent a singular advantage in terms of gathering petitions because he will find it easier to collect signatures at that time. He does not encounter the voter resistance rampant in the heat of a primary or thereafter when voters' views have begun to crystalize regarding party candidates or when many voters have been "turned off" by excessive political activity. He is given his chance at a place on the general election ballot before the others have had an opportunity to capture the loyalty and commitment of the voters.

In many, but admittedly not all, respects the candidate seeking to obtain signatures on a nominating petition has an easier route to the general election ballot than candidates who must run in primary elections. The evidence offered by the State through Professor Smolka and Willard A. Morris, summarized above at pp. 8-9 establishes these advantages. First, the independent candidate does not have to defeat any particular opponent or opponents in order to gain a place on the general election ballot. Secondly, the number of signatures which he must obtain is almost invariably less than the number of votes which a candidate in a primary election must obtain in order to gain his party's nomination. Third, the independent candidate, at least in Maryland, is given a longer period of time in which to "campaign" for his nominating signatures — since the candidate in a primary election must focus his campaign during a period immediately prior to an election so as to have the greatest impact on the voters and on voter turnout, while the independent

candidate need only approach and appeal to a particular voter at a single moment in time (the moment when he asks for the signature) of the candidate's own choosing and, if rebuffed, may later return to that same voter to try again. Fourth, the choice made by a voter in a primary election is an irrevocable one in which he must choose one among several candidates, whereas the choice made by a voter signing a nominating petition is not irrevocable since the voter may withdraw his signature prior to the filing of the petition or may refuse to sign once and then sign when later approached and may, in any event, still vote for another candidate in his party's primary election. The fact that the choice is neither exclusive nor irrevocable in the case of the signing of a nominating petition makes it easier to persuade the voter to exercise that choice in favor of the candidate. And finally, the primary election candidate must get his supporters to physically go to the polls to vote for him whereas the petition candidate can go to the voters in their homes or elsewhere to get their votes.[13]

We do not mean to suggest that it is easy for an independent to gain a place on the general election ballot or, as the lower court suggested we had urged, that party and independent candidates have identical routes to the ballot. Indeed, neither the route to the general election ballot nor the path to ultimate victory is easy for any candidate.

[13] In addition, Maryland law does not control or restrict contributions or expenditures relative to the circulation of nominating petitions but does apply to primary election contributions and expenditures. While this distinction does not apply to candidates for federal office (like Bradley), it is true for all State office candidates.

Maryland does not question the tenet that State ballot access restrictions, including early filing deadlines, can in some cases substantially and unconstitutionally burden the rights of independent candidates and their voting constituency. *Williams v. Rhodes, supra.* Nor does the State challenge the *result* reached in *Tucker v. Salera, supra, viz.*, that a three week gathering period for signatures that ends eight months before the general election is unconstitutional. The State does contend that the Maryland filing deadline, when properly viewed in the context of the total regulatory scheme, is significantly different and less burdensome than the statute at issue in *Salera*[14] and that a thorough examination of the treatment accorded primary and independent candidates by Maryland law and of the problems inherent in either avenue to the general election ballot will demonstrate that "it is problematical at best which [alternative] is more onerous in fact." *American Party of Texas v. White, supra* at 783 n. 16, and that the Section 7-1(e) filing deadline is not "excessively" burdensome.

III.

MARYLAND'S UNIFORM PRE-PRIMARY FILING DEADLINE WORKABLY ADJUSTS THE RELATIVE BURDENS OF OBTAINING GENERAL ELECTION BALLOT ACCESS AND DOES NOT DISCRIMINATE AGAINST INDEPENDENTS.

In *Storer v. Brown, supra* at 729, this Court indicated that even if election law provisions are found to "excessively burden" the right to vote effectively and the right to associate for political purposes, these burdens must result in *discrimination* against an

[14] The State also contends that the justifications proffered for Maryland's uniform pre-primary filing deadline are different from and more substantial than those asserted in *Salera*. See pp. 35-39 *infra*.

independent candidate in order to call into play constitutional scrutiny.

It can hardly be contended that Maryland's scheme of requiring party primary candidates and independent candidates to file their certificates of candidacy at the same time constitutes discrimination such as to call into play substantial or compelling justification for the scheme. In numerous cases courts have pointed to this parity as an additional reason for upholding various state election schemes. For example, in *Jenness v. Fortson*, 403 U.S. 431, 433-34 (1970), this Court specifically acknowledged the parity defense in approving the Georgia election laws, when it stated:

> "The total time allowed for circulating a nominating petition is 180 days, and it must be filed on the second Wednesday in June, the *same deadline that a condidate filing in a primary must meet.*" (emphasis added).

See also *Storer v. Brown, supra*, at 733, where the Supreme Court noted of California's election scheme:

> "The independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Otherwise, the qualifications required of independent candidates are very similar to, or identical with, those imposed on party candidates."

A uniform pre-primary filing deadline for all candidates was also present in *Jackson v. Ogilvie*, 325 F. Supp. 864, 867 (N.D. Ill. 1971), *aff'd* 403 U.S. 925 (1971), where a challenge to Illinois' election laws was rejected, See also *Pratt v. Begley*, 352 F. Supp. 328 (1970), *aff'd* 409 U.S. 943 (1972) where a three-judge federal court upheld a filing deadline for independents which occurred seven months before the general election:

> "The statute is not unconstitutionally discriminatory. It does not make it any more difficult for an

> independent candidate to have his name placed on the ballot than a party candidate. The statute simply requires all potential candidates, whether Democrat, Republican or Independent, to file for nomination on the same date." 352 F. Supp. at 330.

See also *Auerbach v. Mandel, supra,* where the lower court in its oral opinion noted that Maryland's uniform filing deadline enabled *all* candidates "to be known at the same time."

Failing to observe that a Presidential election year places greater burdens on *all* Maryland candidates and that the State has a significant interest in equalizing these burdens, the lower court has fashioned a rule which affords advantages to independent candidates which are not available to primary candidates and ultimately places greater burdens on all candidates.[15]

[15] In *Jenness v. Fortson, supra,* at 440, this Court was distinctly aware of the fact that a state system of ballot access can discriminate against primary candidates and in favor of independents when it noted:

> "The appellants' claim under the Equal Protection Clause of the Fourteenth Amendment fares no better. This claim is necessarily bottomed upon the premise that it is inherently more burdensome for a candidate to gather the signatures of 5% of the total eligible electorate than it is to win the votes of a majority in a party primary. That is a premise that cannot be uncritically accepted. Although the number of candidates in a party primary election for any particular office will, of course, vary from election to election, the appellee's brief advises us that in the most recent election year there were 12 candidates for the nomination for the office of Governor in the two party primaries. Only two of these 12, of course, won their party primaries and had their names printed on the ballot at the general election. Surely an argument could be well be made on behalf of the 10 who lost, that it is *they* who were denied equal protection vis-à-vis a candidate who could have had his name printed on the ballot simply by filing a nominating petition signed by 5% of the total electorate."

In addition, the District Court decision stands as a warning to states that they dare not attempt, even for the ultimate benefit of the voters and the electoral process, to place party candidates and independents on an equal or comparable footing lest they risk a finding of unconstitutional discrimination.

For example, the lower court in *Bradley* belittled the primary candidate's need to know the identity of the independent candidate at filing time because at that point he did not know the identity of his general election opponent from the opposite party. Such reasoning ignores the fact that a primary candidate always knows that he will have an opponent from the opposite party. However, under the lower court's "alternate means" (permitting an independent candidate to file his certificate of candidacy at the same time as primary candidates but not demanding the necessary signatures until the primary elections or thereafter) the primary election victor would not know he was to have in addition an independent opponent until after the primary election and possibly well into his general election campaign, perhaps after a substantial amount of campaign funds had already been spent or committed in different directions.

The lower court also emphasized that an independent candidate would not know who his opponents were until after the primary. However, *as of the filing date,* an independent does not truly know whether he himself will qualify for the general election ballot. In light of the thirty-five day validation process and the possibility of legal challenges to the petitions, he may not be certain of his own status until after the primary election. In the present case, the court's opinion was filed one day before the May 18 primary.

This tunnel vision of the lower court is further evidenced by its sole focus on the respective burdens of primary *contestants* and *potential* independent candidates and its blindness to the situation of primary *victors* and independents who qualify for the general election ballot. Maryland's 70 day pre-primary filing deadline allows 35 days for signature validation and another 35 days for challenges, with the result that *all* general election candidates are known to each other and the voters at approximately the same time. However, under the lower court's rule, primary victors are forced to run "in a vacuum" for at least 35 days (in the present case from May 18 to July 13 plus 35 days) and a successful independent gets a late start in the general election since he does not know his status until at least 35 days after he submits his signatures (here, mid-August).

Moreover, if an independent candidate is to have a chance at success in the general election against a party opponent, it is important that his status as a candidate be determined at the earliest possible moment. For example, Appellee Bradley, in an affidavit attached to his complaint and filed two weeks after being notified of the insufficiency of his petitions, urged the District Court to grant him expeditious relief because "the campaign has received calls from potential contributors who will donate only after Mr. Bradley is officially on the ballot" (A. 24A). Thus, Bradley's own evidence attests to the vital need for independents to qualify at an early date — an interest served by the pre-primary filing deadline.

In short, instead of Maryland's non-discriminatory, workable statutory scheme for adjusting the relative burdens of obtaining general election ballot access, the lower court, out of concern for excessive burdens and

discrimination, has created a system that unjustly discriminates against primary candidates and imposes greater hardships on all candidates.

IV.

EVEN IF MARYLAND'S UNIFORM PRE-PRIMARY FILING DEADLINE IS FOUND TO EXCESSIVELY BURDEN CONSTITUTIONAL RIGHTS AND THUS DISCRIMINATE AGAINST INDEPENDENT CANDIDATES, ANY DEPRIVATION OF BRADLEY'S RIGHTS IS JUSTIFIED BY NUMEROUS COMPELLING OR SUBSTANTIAL INTERESTS.

The basic justification for any nonimation by petition scheme for independent candidates lies in the State's duty "to protect the integrity of its political processes from frivolous or fraudelent candidates". See *Bullock v. Carter*, 405 U.S. 134, 145 (1972) and *Jenness v. Fortson*, *supra* at 442. Maryland's uniform pre-primary filing deadline fosters this interest. If independent candidates were allowed to perfect their filings at a later date than primary candidates, the way would then be open for the perpetration of some of the time-honored election tricks which invariably confuse the voter and distort the process. For example, one party's nominee might await the outcome of the (other party's) primary and then determine that it would be to his advantage to promote the candidacy by petition of a third candidate for the purpose of artificially siphoning off votes which would otherwise go to the other party's nominee. This might be accomplished by promoting an independent candidate with a name or political appeal similar to the opponent. The lower court's alternative means — that the State permit an independent to file his certificate of candidacy at the same time as primary candidates but demand the necessary signatures on or after the primary election — would not resolve this problem. Unscrupulous party candidates could still encourage

the launching of numerous "protective" petition candidates either to confuse their opponents or to preserve their ability to siphon off the votes when the contingency develops. Nor are such schemes in Maryland electoral politics merely the products of a fertile imagination. Siphoning votes via third candidacies is a hard reality and almost a rule of the game. See *Reeves v. Reeves*, 275 Md. 599 (1975), which involved the siphoning off of votes in a primary by a "name's-the-same" candidate.

In addition, the Section 7-1(e) filing deadline promotes voter and candidate knowledge of all general election candidates at approximately the same time and prevents both independent and primary candidates from obtaining an unfair advantage over each other.

Unlike this Court in *American Party of Texas v. White, supra* at 787 n. 18, the lower court failed to include in the seventy day period between the date an independent candidate must file his signatures and the date of the primary necessary time for administrative and court challenges to the signature verification process. Maryland law requires petition signatures to be validated by the local boards within 35 days of their submission. (April 12 in the present case). For petition gathering campaigns for statewide office, results are forwarded to the State Administrative Board of Election Laws which determines the sufficiency of the signatures and notifies the candidate (April 15). Appellee here filed suit on April 30, two weeks following that determination. After expedited consideration by a three-judge panel, it was not until the eve of the May 18 primary that Bradley's likely status as a qualified independent candidate for U.S. Senate was determined. The point of this litany is clear: under the present Maryland scheme all parties to the electoral process

will know the identity of qualified independents at approximately the same time the primary winner is determined. The three-judge panel in *Auerbach v. Mandel, supra*, expressly noted this value when it sustained the Section 7-1(e) filing deadline in 1972:

> ". . . [V]iewed in perspective of its reasons, March 6th in itself is not an unreasonable time when you consider the need and the State's legitimate interest . . . in requiring . . . that all candidates . . . be known at the same time." Jurisdictional Statement, *Auerbach v. Mandel* at 29.

Moreover, the uniform pre-primary filing deadline, examined in this light, prevents either independents or primary candidates from gaining the upper hand. Under Maryland's scheme, both candidates for the general election ballot will have the same campaign period. If an independent candidate is allowed to submit his signatures on the date of the primary (as the lower court held) and wait 35 days for signature verification) plus an uncertain period of time for administrative and legal challenges to become an official candidate, his party opponents in the general election may have made such headway in campaigning and fund-gathering that the prospects of a serious race by the independent will have evaporated.[16] Conversely, under the lower court's dual deadline system, a party candidate who has spent the majority of his campaign funds in a tough primary may receive the shock of his life to learn that halfway through his general election campaign he now has another serious opponent, viz. an independent candidate.[17] And nothing in the lower

[16] Due to his late campaign start, Bradley gathered only 62,750 votes in the November election. He ultimately obtained 68,341 signatures during his petition campaign, of which 53,567 were valid.

[17] Because of the possibility of administrative and legal challenges with respect to signature validation and independ-

court's proffered election scheme, i.e., uniform filing of certificates of candidacies but waiting until the primary to demand the necessary signatures, will cure these problems; this is because no one, be it voter, party-candidate, newsman or contributor, is going to take an independent seriously until he is an official, qualified general election candidate.[18]

In addition to these significant interests served by Maryland's uniform pre-primary filing deadline, Section 7-1(e) helps foster public discussion of issues among *all* candidates when voter interest is at its peak, viz. the primary campaign. Although this Court has recognized that "public discussion [by candidates] is a political duty", *Buckley v. Valeo, supra,* 46 L. Ed. 2d at 707, Appellee Bradley, who had instructed his signature gatherers to avoid discussing issues during the petition gathering campaign, generally declined speaking invitations which flowed in during the primary campaign. Transcript of Proceedings at 78. He declined to take advantage of these offers of public attention which could have advanced his cause in the general election and which could have afforded him the unique opportunity of attacking without retort his likely general election opponents who were preoccupied with their primary battle. Most importantly, he declined to shed any light for the primary voters (who are also the general election voters) on the issues debated during the campaign. This opportunity and obligation stemmed from Maryland's uniform filing deadline, which stimulated interest in Bradley as a candidate.

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ent ballot access, election officials may face greater administrative difficulties with a later filing deadline for independents.

[18] See Appellee Bradley's testimony that contributors were holding back on committing campaign funds to him until he was a qualified candidate (A. 24A).

Finally, Maryland's uniform pre-primary filing deadline promotes all of these interests while still preserving the right of State voters to be heard at an early point in a Presidential election year with respect to their choice for Presidential nominees. As indicated earlier, a Presidential election year places greater burdens on all Maryland candidates than off-year elections. Not only is the filing date earlier, but all candidates must campaign for a longer period of time. And voters are faced with a greater prospect of confusion as elections, both national and local, become a year-long preoccupation. But the State quite understandably has determined that a May primary is important in Presidential election years in order to give Maryland voters a role in selecting the Presidential candidates and to increase voter participation in the State electoral process. The lower court's decision demands that the State either forego this role for its voters or abandon the legitimate interests asserted in behalf of the Section 7-1(e) filing deadline.

In short, the State contends that whether viewed separately or in conjunction, these interests are more than sufficient to support whatever burdens or discrimination may be said to arise from Maryland's uniform filing deadline.

V.

HICKS v. MIRANDA DID NOT RELIEVE THE DISTRICT COURT OF ITS OBLIGATION TO DISTINGUISH AND HARMONIZE PRIOR SUMMARY AFFIRMANCES AND WRITTEN DECISIONS OF THIS COURT UPHOLDING THE CONSTITUTIONALITY OF STATUTES SUCH AS SECTION 7-1(e) NOR DID IT SUGGEST THAT SUMMARY AFFIRMANCES REPRESENT AN ADOPTION OF THE PRECISE REASONING OF THE LOWER COURT.

A fundamental issue in this case is whether the lower court guessed correctly when it held that the summary affirmance in *Salera v. Tucker, supra,* in effect

overruled the five summary affirmances and two written decisions of this Court which support the constitutionality of Maryland's uniform filing deadline for candidates. On two occasions the court below opined on the effect to be given particular summary affirmances of this Court. The three-judge panel noted that the issue of the constitutionality of the Section 7-1(e) filing deadline had been raised in this Court in *Auerbach* but said "we do not believe that the Supreme Court decided it". (AJS. p. 11a). Yet, despite the fact that the issue as framed for this Court in *Salera* wove together the constitutionality of both the signature gathering period and filing deadline for independent candidates in Pennsylvania,[19] the lower court here said "we are confident that *Salera* did decide the issue before us", (AJS. p. 8a) *viz.*, the validity *vel non* only of a pre-primary filing deadline. Absent in the court's opinion was any attempt to employ the methodology of *Storer* and *Jenness* or any serious attempt to distinguish the substantial amount of authority in support of the constitutionality of Section 7-1(e). In effect, the lower court declared that the summary affirmance in *Salera* had overruled the following written and summary decisions of this Court: *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham v. Gilligan*, 409 U.S. 942 (1972) (upholding

[19] According to Pennsylvania's Jurisdictional Statement in *Salera*, the relevant question was framed: "Whether the United States District Court for the Easten District of Pennsylvania, sitting as a three-judge court pursuant to 23 U.S.C. §2284, committed error in ruling that, under the Pennsylvania Election Code, the requirement that candidates of political bodies collect signatures for their nomination papers between the tenth and seventh Wednesdays prior to the primary election *and* file such nomination papers no later than the seventh Wednesday prior to the primary election, violated a constitutional right secured by the United States Constitution." (Emphasis added).

a filing deadline of 90 days before the primary and 9 months before the general election); *Pratt v. Begley*, 352 F. Supp. 328 (D. Ky. 1970), *aff'd* 409 U.S. 943 (1972) (upholding a filing deadline of 55 days before the primary and 7 months before the general election); *Jenness v. Fortson*, 403 U.S. 431 (1970) (upholding a filing deadline of 69 days before the primary and 5 months before the general election even though this provision was coupled with a 180-day signature-gathering period and a 5% signature requirement); and *Williams v. Rhodes*, 393 U.S. 23 (1968) (where the filing deadline later sustained in *Sweetenham* was struck down *but only* in conjunction with restrictive provisions of Ohio law which made it virtually impossible for a nonparty candidate to obtain ballot access).[20] Apparently of little concern to the panel below during this devastation of this Court's ballot access cases was the fact that less than two months before the *Salera* affirmance *Jenness* was relied upon by this Court to sustain the constitutionality of certain provisions of the Federal Election Campaign Act in *Buckley v. Valeo*, *supra*, at 733-36, or that the *Auerbach* and *Wood* cases were cited favorably in *Storer*, *supra*, at 739, n. 10 when this Court last gave plenary consideration to a ballot access case.

The lower court cited *Hicks v. Miranda*, 422 U.S. 332 (1975), as authority for its out-of-hand dismissal of the precedential value of the above decisions. However, it is not even clear that *Hicks* would apply in this case. In *Hicks* this Court said that a lower federal court erred in disregarding a prior state court case appealed to the

[20] In addition, the lower court laid waste to *Auerbach*, *Maryland People's Party* and *Wood v. Putterman*, the three cases between 1970 and 1973 in which this Court gave summary, favorable consideration to the constitutionality of Maryland's nomination by petition process (which has not since changed).

Supreme Court and dismissed "for want of a substantial federal question". The present case, however, involves a summary affirmance, not dismissal for want of a substantial federal question, and this Court on a number of occasions has stated that the former are less weighty decisions. In *Gibson v. Berryhill*, 411 U.S. 564, 576 (1973), this Court conceded that summary affirmances are "somewhat opaque". And in *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975), Chief Justice Burger in his concurring opinion stated:

> "When we summarily affirm without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."

Cf. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

In addition to applying to summary dismissals rather than summary affirmances, *Hicks* required a federal court considering a constitutional challenge to a statute to accord precedential effect to a summary disposition relative to the *exact same statute*. Thus if the lower court in *Bradley* was going to follow in its entirety its mistaken view of *Hicks*, it would have been obligated to feel itself bound by *Auerbach* which involved the constitutionality of Section 7-1(e) rather than *Salera* which dealt with a different Pennsylvania law.

However, even assuming *Hicks* applies fully to summary affirmances, it still would mean only that a summary affirmance by the Supreme Court is a decision on the merits in a case and that lower courts are not free to disregard such decisions. It does not elevate the lower court opinion to equal footing with the words of this Court, nor does *Hicks v. Miranda* prescribe the weight to be given the lower court's

reasoning in light of a summary affirmance that follows hard on the heels of a line of written and summary decisions which suggest or mandate a result contrary to that reasoning but consistent with the result in the case.[21] In light of the seriousness with which this Court regards the prospect of overruling a prior decision, lower courts should have a similarly weighty obligation to reconcile a single summary affirmance with other Supreme Court decisions of recent vintage by employing the methodology set out in this Court's written decisions. Even in *Hicks*, this Court indicated that lower courts should "ascertain the reach and content of summary actions." 422 U.S. at 345 n. 14.

One thoughtful commentator on *Hicks v. Miranda* has said that pursuant to this duty, lower courts must

> ". . . analyze carefully the grounds upon which the statute was upheld in the prior appeal, including, for example, the precise wording of the statute, the constitutional provisions relied upon, the party who asserted the claim in the prior appeal and most importantly, the precise facts upon which the statute was upheld". Note: The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of *Hicks v. Miranda*, 76 Columbia L. R. 508, 529 (1976).

In disregard of these principles, the lower court here avoided numerous opportunities to distinguish *Salera* from the present case. First and foremost was the requirement of the Pennsylvania statute that signatures be gathered within 21 days. The three-judge court for the District of Maryland, like the lower court in *Salera*, was all too quick to proclaim such a feature as *per se* unburdensome under all circumstances, a course

[21] As noted earlier, we have no quarrel whatever with the *result* of striking down a three-week signature-gathering period which ends as early as was the case in *Salera*.

which this Court eschewed in *Storer*, 415 U.S. at 740. In *Storer* this Court deemed a 24-day period to gather signatures for an independent Presidential candidate as "a substantial requirement" and remanded the case for a determination of whether this provision coupled with other restrictive features of California law placed too great a burden on independent candidates. As a practical matter, the absence of such a substantial restriction from Maryland's nomination by petition law renders the scheme challenged by Bradley infinitely less burdensome than the Pennsylvania statute. Moreover, even the lower court's opinion contained repeated references to the unconstitutional remoteness from the general election of the "signature gathering period". 399 F. Supp. at 1266-67. *Salera* is also distinguishable in a number of other important respects. It involved a 218-day period before the general election in a non-Presidential election year. In such cases, Maryland requires only a 120-day period. Moreover, the element of the Presidential preference primary present in this case necessarily strengthens the legitimate state interests so summarily rejected in *Salera*. This case also involves substantial interests not presented or discussed in *Salera*, but considered substantial by this Court in prior cases. In addition, *Salera* is distinguishable on the basis of facts the three-judge court in Pennsylvania thought important, *viz.*, the status of the parties. In *Salera* the statute was challenged by a class who expressed its intention to vote for the candidate, 399 F. Supp. at 1262 N. 4. In the present case the only intent averred by Bradley's supporters is their desire to see his name on the general election ballot. The *Salera* court even determined that the bad weather petition circulators must face when gathering signatures at an early date was important in gauging burdensomeness. 399 F. Supp. at 1266. Evi-

dence before the Bradley court here indicated that in 1976-76 Maryland had one of its mildest winters in history.[22]

In short, if the lower court wanted to avoid its draconian reversal of this Court's ballot access cases, it could have readily and reasonably distinguished *Salera* on a number of bases. Moreover, it could have and should have relied on the principles of written decisions of the Supreme Court to resolve the result reached in *Salera* with a conclusion that Section 7-1(e) is not violative of Bradley's constitutional rights.

[22] Unlike the situation in *Salera*, the Maryland statute was challenged by an independent candidate who demonstrated that he was able to acquire a sufficient number of signatures by the filing deadline, but was kept off the ballot because the inefficiency of his campaign resulted in thousands of invalidated signatures.

CONCLUSION

In summary, Appellants urge that the District Court has abdicated its duty to reconcile *Salera* with other decisions of this Court, to employ the methodology set out in *Storer* and *Jenness*, and to gauge the impact of Maryland's candidate filing date in light of other features of the State's election law and the realities of independent ballot access in Maryland. For these reasons, the State contends that the lower court abused its discretion in enjoining State election officials from refusing to accept additional signatures submitted by Appellees after the statutory deadline, and the Appellants were entitled to judgment as a matter of law. Accordingly, the decision of the District Court must be reversed and judgment entered for Appellants.

Respectfully submitted,

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